A **KHOR PHAIK EAN & ANOR**

v.

CHEW SIEN LUP & ANOR

B HIGH COURT MALAYA, PENANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-216-2010]
20 FEBRUARY 2012

C ***TORT:*** *Negligence - Negligent acts - Stolen items - Defendants executors of will - Residual estate consisted of valuable watches - Items in deposit box, required to move to new bank - Items kept in boot of a locked car during transaction at new bank - Items stolen when defendants in new bank - Whether act of leaving items in the car instead of carrying items*
D *into bank constitutes negligence*

The 1st and 2nd defendants were the executors of the estate of the deceased. The deceased, in his will, had left his wife ('1st plaintiff') RM1,000, and to his son ('2nd plaintiff') he left seven
E Rolex watches, one Maurice Lacroix watch, one chain with three crystal lockets/pendants, one gold ring and some spare parts for the watches ('the items'), all of which were kept in a safe deposit box at Malayan Banking Berhad at Jalan Bagan Luar, Butterworth ('the 1st bank'). The items were held by the 1st defendant on
F trust for the 2nd plaintiff until he reaches 21 years old. In September 2008, the 1st bank had contacted the 1st defendant, informing him that it would be terminating the said safe deposit box rental services and all the items therein had to be removed. After collecting the items which were kept in a bag and placed in
G the car boot, the defendants went to Maybank at Taman Inderawasih, Seberang Perai ('the 2nd bank') to open a new safe deposit box account. The defendants did not carry the items with them as they were worried of snatch thieves. However, after coming out of the 2nd bank, the defendants found that the
H window at the driver's side was smashed and all the items were gone from the car boot. A police report was immediately lodged by the defendants. The plaintiff contended that the defendants should not have delayed the collection of the items and that the defendants ought to have called the 2nd bank for the new safe
I deposit box account before they removed the items from the 1st bank. The question that arose was whether the act of leaving the valuable items in the car boot with the car properly locked constitutes negligence.

Held (dismissing claim with costs of RM6,000):

(1) Since the 1st plaintiff has no interest in the claim, she cannot be a party herein in her personal capacity to sue the defendants as executor of the estate of the deceased. (para 6)

(2) If a trustee is robbed and that robbery is properly proved, it shall be a discharge of him from liability provided he keeps the trust property as he would keep his own and that an executor or administrator who stands in the condition of a gratuitous bailee will not be so liable without some default in him (*Job v. Job,* refd). Section 35(1) of the Trustee Act 1949 states the requirements of willful default on the part of the trustee for this to be chargeable or accountable. (para 9)

(3) Neither the delay nor the arrangement with the 2nd bank for the new safe deposit box account were the direct causes for the loss of the items but it was the act of theft which caused the loss. (para 10)

(4) The defendants should be entitled to adopt the method which they sincerely and honestly held to be the better option at the material time although others might choose the other option. A person should not be penalized for his honesty and sincerity. The learned judge also found that it was not unreasonable for the defendants not to carry along the valuables with them when they went to the 2nd bank since this was a reasonable precaution to minimize a real risk of the items being snatched or robbed. Further, the fact that the defendants kept the items in the car boot not visible to any passerby and had locked the car, showed that they had taken reasonable precaution. (para 10)

Case(s) referred to:
Job v. Job [1877] 6 Ch D 562 ***(refd)***

Legislation referred to:
Trustee Act 1949, s. 35(1)

For the plaintiffs - R Shamini; M/s R Sharmini Siva Ramiah & Co
For the defendants - Chang Kheng Hoe; M/s Kheng Hoe & Partners

Reported by Baizura Abd Razak

A

JUDGMENT

Chew Soo Ho JC:

Brief Facts

B **[1]** 1st plaintiff is the wife of Chew Sien Chee, deceased while Chew Keng Yon is the lawful son and legal beneficiary to the estate of the said deceased.

[2] Both the 1st and 2nd defendant are the siblings of Chew
C Sien Chee and 1st defendant is the executor of the estate of the deceased. Grant of Probate to 1st defendant dated 14 June 2000 and issued on 8 November 2000 is as shown in bundle B p. 1-6. 2nd defendant became co-trustee on the request by 1st defendant who does not reside in Malaysia to assist in the affairs of the said
D estate. The 1st plaintiff's interest in the will of the deceased is a pecuniary legacy of RM1,000 which sum had been paid to 1st plaintiff. All residual estate of the deceased are to be held by the 1st defendant on trust for the 2nd plaintiff until he reaches 21 years old. These residual estate comprised of seven Rolex watches,
E one Maurice Lacroix watch, one chain with three crystal lockets/ pendants, one gold ring and some spare parts for the watches, all of which were kept in a safe deposit box in the bank.

[3] Sometime in September 2005, the 1st defendant received a
F letter from Malayan Banking Berhad (Maybank) at Jalan Bagan Luar, Butterworth ("the 1st bank") informing him that it would be terminating the said safe deposit box rental services and that all items therein contained had to be removed. Through 2nd defendant, arrangement was made to collect all the items on 27
G January 2006. After collection by both defendants, all the items were kept in a bag and placed in the boot of the 1st defendant's car which was not visible to passers-by and the car was properly locked before both defendants proceeded to another branch of Maybank at Taman Inderawasih, Seberang Perai ("the 2nd bank")
H to open a new safe deposit box account. The defendants did not carry all the items collected with them as they felt that it was unsafe and were wary of snatch thieves. When they subsequently came out from the 2nd bank to the car, it was discovered that the window at the driver's side was smashed and all the items
I removed from the 1st bank were stolen from the boot. The defendants lodged a police report immediately. This police report is as shown in bundle B p. 11.

[4] The plaintiff alleged negligence on the part of the defendants in leaving valuable items in the car instead of carrying all the items with them when they went to the 2nd bank thereby causing the items to be lost and thus the plaintiffs claimed for the market value of the watches and the jewellery which is to be valued by an expert determined by both parties or whosoever within two weeks from the date of the order. The defendants shall them pay the said value within one month from the date the value has been determined by the expert; damages, interest and costs are also claimed.

The Issues

[5] The sole issue before this court upon the facts of this case which is substantially undisputed is whether the loss of the items being the residual estate for the benefit of Chew Keng Yan, an infant, which were kept in the boot of the 1st defendant's car under lock, was due to or caused by the negligence of the defendants.

Findings

[6] A preliminary point taken in submission by the defendants is in relation to the capacity of the 1st plaintiff. It was submitted that the 1st plaintiff, by her own admission in evidence that she has no interest in the claim except for the interest of her son Chew Keng Yan, an infant, for the loss of his right and entitlement to the residuary estate of her late husband, the deceased, would have no capacity to be a party in this suit. The last will and testament of the deceased (bundle B pp. 2-4) only bequeathed a pecuniary legacy of RM1,000 to 1st plaintiff which had been paid to and received by her. This is undisputed. All the residuary estate were to be held in trust for the infant child Chew Keng Yan. Since the 1st plaintiff has no interest in the claim, she cannot be a party herein in her personal capacity to sue the defendants as executor of the estate of her late husband, the deceased. I must agree and therefore hold that the 1st plaintiff's claim ought to be dismissed.

[7] The 2nd plaintiff's claim is premised on negligence of the defendants in that by leaving the seven Rolex watches, one Maudrice Lacroix watch, one gold ring, one gold chain and some spare parts of the watches in the boot of 1st defendant's car after

all these valuable items were removed from the safe deposit box from the 1st bank instead of transferring them immediately to a safe deposit box in another bank, the plaintiff alleged that it is negligence resulting in the loss to the 2nd plaintiff as the sole beneficiary.

[8] There is no doubt from the fact that the items which formed the residuary estate were removed from the 1st bank and while the defendants were going to the 2nd bank to open a new deposit box account, these items were kept in a box in the boot of the 1st defendant's car which was duly locked. When they returned subsequently to the car, it was found that the window at the driver's side to have been smashed and the valuable items were gone as reported in 1st defendant's police report lodged on the same date of 27 January 2006 at 1652 hours. The question is by leaving these valuable items in the car boot with the car properly locked, does it constitute negligence? plaintiff argued that the defendants should have carried along these valuable items with them when they proceeded to the 2nd bank and should not have left them in the car unattended to by anyone. The defendants contended that they were wary of snatch thieves if they were to carry these valuable items to walk to the 2nd bank thinking indirectly that it would be safer to keep them in the car boot not visible to any passers-by with the car properly locked. In the cited case of *Job v. Job* [1877] 6 Ch D 562, Jessel MR said at p. 563:

> Now, I refer to *Jones v. Lewis* (4), where a common decree was made against an administratrix for an account. Part of the assets had been delivered by her to her solicitor, who was robbed, and it was held that she was not to be charged. Lord Hardwicke said, "If a trustee is robbed, that robbery properly proved shall be a discharge, provided he keeps them (the goods) so as he would keep his own. So it is as to an executor or administrator, who is not to be chargeable further than goods come to his hands; and for these not to be charged, unless guilty of a devastavit; and if robbed, and he could not avoid it, he is not to be charged, at least in this court" ...
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> ... In Williams on Executors (1) the law is thus stated: "Again, upon the supposition that goods come fully into the possession and hands of an executor or administrator, but are afterwards wrongfully taken from him, a question arises whether such goods shall be considered assets in his hands. There are some authorities

> for asserting that things taken out of the possession of the executor are assets in his hands, unless they were taken by the queen's enemies. But it should seem, at least in a Court of Equity, that an executor or administrator stands in the condition of a gratuitous bailee; with respect to whom the law is that he is not to be charged, without some default in him. Therefore, if any goods of the testator are stolen from the possession of the executor, or from the possession of a third person, to whose custody they have been delivered by the executor, the latter shall not, in equity, be charged with these as assets" ...

[9] The principle that can be discerned from the above authority is that if a trustee is robbed and that robbery is properly proved, it shall be a discharge of him from liability provided he keeps the trust property as he would keep his own and that an executor or administrator who stands in the condition of a gratuitous bailee will not be so liable without some default in him. The requirement of wilful default on the part of the trustee for him to be chargeable or accountable is also provided in s. 35(1) of the Trustee Act 1949 which states:

> 35. (1) A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, or of any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default.

[10] Is the loss herein through the wilful default of the defendants? The plaintiffs contention is primarily that the defendants should not have delayed the collection of the watches and jewellery items and that the defendants ought to have called the 2nd bank for the new safe deposit box account before they removed the watches and jewellery items from the 1st bank. The defendants submitted, I think rightly, that the delay in collecting the watches and jewellery items and the failure to make prior call or arrangement with the 2nd bank for a new safe deposit box account, are not the direct cause for the loss of the watches but it was the act of theft which caused the loss. One cannot deny the fact that had it not been for the theft of the watches and

jewellery items from the 1st defendant's car, it matters not whether the defendants collected the items late or failed to make prior arrangement with the 2nd bank earlier, the items would still be in the car boot. On the question whether the defendants had committed any wilful default which goes to prove negligence when they left the valuable items in the boot of the car, the defendants after having taken the watches from the 1st bank, were confronted with the predicament of whether to carry the whole of the valuables with them to the 2nd bank or to place them in the boot of the 1st defendant's car which was to be locked before going to the 2nd bank to apply for the safe deposit box account. If they were to carry them along to go to the 2nd bank, the risk of snatch-thief snatching the valuables was their bugging worry. Alternatively, if the valuables were kept in the boot of the car not visible to any passer-by and with the car being locked, it might appear safer as compared to carrying them on the defendant's persons. Of course, the defendants chose the second alternative. Assuming that the defendants had elected the first mode of carrying the valuable items with them to the bank and these items were presumably stolen by snatch thief or robbed by robbers, could it be also alleged that the defendants were negligent and/or of wilful default when they could have kept the valuables in the car which was to be properly locked and perhaps, safer? and assuming that they had to carry the valuables home because no safe deposit box was available and the items were kept in a proper locked box or cupboard in the house but were stolen or robbed, can the defendants be chargeable for negligence or wilful default? I would think that any reasonable man will answer in the negative. The simple reason is that we do not know when the thieves or the robbers are to strike. It would be unrealistic and inconceivable that theft or robbery is foreseeable. The defendants had locked the car after having kept the valuables in the boot and this I believe they did; otherwise, there will be absolutely no reason for the window at the driver's side to be smashed in order to open the car particularly the boot to commit the theft. Even if someone was left to attend to the car as the plaintiff had contended, for all we know, it might be robbery instead of a theft. There is no assurance that the valuable items would not be forcefully taken away assuming someone was present at the car. In the circumstances of this case where the defendants were confronted with two options of action to be taken to secure the

valuable items, the defendants should be entitled to adopt the one which they sincerely and honestly held to be the better of the two at the material time although others might choose the other option. A decision ought to be made at the material time whether they chose one or the other. They should not be chargeable purely because they chose the one option which is not favourable to others so long as they honestly held that that was the better option at the relevant time. A person should not be penalised for his honesty and sincerity. I find that it was not unreasonable for the defendants not to carry along the valuables with them when they went to the 2nd bank since this is a reasonable precaution to minimise a real risk of the items being snatched or robbed from their persons having had the knowledge of such occurrences of theft from the media. I also find that the defendants by keeping the items in the boot of the car not visible to any passers-by and locking the car, have taken reasonable precaution against the risk to the valuable items. *(The Wagon Mound (No. 2))*. It must also be noted that the defendants collected the valuables at about 3.30 pm which time was determined by the 1st bank and went to the 2nd bank to attend to affairs relating to the safe-keeping of the same valuables. They left the 2nd bank soon after completion of the matters there for the car at about 4.20 pm only to discover the theft. It must be less than 50 minutes between the time from the 1st bank to completing the matters at the 2nd bank that the unfortunate event of theft had occurred. I cannot find any wilful neglect on the defendant's part based on such fact as they were attending to matters relating to the said safe keeping of residuary estate and not on matters of their personal affairs. As soon as they completed the matters in the 2nd bank, they returned to the car. It is unfortunate that the theft had occurred in such a short spate of time,

[11] In *Halsbury's Laws of Malaysia* at para. [380.151], it was stated:

> The degree of care required in any given factual matrix is a question of fact and must necessarily be dependant on the circumstances of the case; for this purpose, there is no absolute standard, and it may be said generally that the degree of care required would vary directly with the risk involved. Consequently, those who are engaged in operations inherently dangerous are required to take precautions which are not required of persons

A engaged in the ordinary routine of daily life. It follows that not every error judgment or mistake would give rise to an action in negligence; and it is for the court to decide, after the facts are determined, whether the defendant had or has not attained the required standard of care in a given factual situation ...

B **[12]** Each case must depend on its own fact as to the degree of care in a given situation. There is no hard and fast rule but that it depends on the risk that is tangible or probable at that given time. On the facts and evidence in this case which is substantially undisputed, I am of the view that the defendants in keeping the C valuables in the boot of the car which was properly locked instead of carrying them in their persons when they went to the 2nd bank to avoid the risk of snatch theft, did not fall short of the standard of care required in balancing the more tangible risk of being snatched of the valuables from their persons if they were D to carry them with the lesser degree of risk by keeping the valuables in the car boot which would not be visible and with the car locked. The defendants should not be faulted for negligence purely because they presumably had made an error in their judgment to choose the mode which resulted in the loss when E they honestly held that the elected mode was proper and safer having considered the risks.

[13] In conclusion, upon a finding of facts and on a balance of probabilities, I find that there was no negligent act or wilful default F on the part of the defendants for them to be liable for the theft of the said valuable items and consequently I hold that the plaintiff had failed to prove the case against the defendants. In the circumstances, the 2nd plaintiff's claim against the defendants is dismissed with costs of RM6,000.

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